Supreme Court, U.S.
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In The

Supreme Court of the United States

RONALD KIMBROUGH,

Petitioner,

versus

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I.

Consistent with the due process clause of the Fifth Amendment, and the *Pinkerton* Doctrine (*Pinkerton v. United States*, 328 U.S. 640 (1946)) § 1B1.3 (Relevant Conduct) of the Guidelines imposes criminal liability for the acts of a co-conspirator *only* when those acts are reasonably foreseeable and in furtherance of the jointly undertaken criminal activity. The question presented is whether all the offenses that fall under § 2X3.1 and § 2X4.1 of the Guidelines are exempt from the foreseeability requirement of § 1B1.3.

PARTIES TO THE PROCEEDINGS IN THE COURTS BELOW

1. Ronald Kimbrough
2. Terry Cordier
3. The United States of America

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ronald Kimbrough respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered on July 21, 2008, to resolve the conflict in the circuit courts of appeals that was further widened by this judgment, and to address the important question of federal law the judgment raises.

OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the Court of Appeals that gives rise to this petition is *United States v. Kimbrough*, reported at 536 F.3d 463 (5th Cir.2008). A copy of the opinion of the Court of Appeals is attached to this petition as Appendix A. The opinion of the district court from which the Government took an appeal to the Fifth Circuit is unreported. That opinion is attached hereto as Appendix B. The order of the Court of Appeals denying Kimbrough's petition for a rehearing *en banc* is unreported. That order is attached as Appendix C.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

On July 21, 2008, following the Government's appeal from the proceedings in the district court, the Court of Appeals for the Fifth Circuit vacated the judgment of the district court, and remanded the cause for a resentencing of petitioner Kimbrough and his co-defendant Terry Cordier. On August 4, 2008, Kimbrough timely filed a petition for rehearing *en banc*. On August 19, 2008, the Court of Appeals for the Fifth Circuit denied Kimbrough's petition. *See* Appendix pp. 32-33. This Court has jurisdiction under 28 U.S.C. § 1254(1), and this petition is timely under Supreme Court Rule 13.3.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

United States Sentencing Guideline § 1B1.3 provides, in pertinent part:

> **§ 1B1.3** ***Relevant Conduct (Factors that Determine the Guideline Range)***
>
> (a) *Chapters Two (Offense Conduct) and Three (Adjustments).* Unless otherwise specified,

(i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics, and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

* * *

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by a defendant in concern with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,

STATEMENT OF THE CASE

In January, 2005 Assistant United States Attorney Tracey Knight was working on a draft of an affidavit in support of an application for a wiretap of the cellular telephone of Tyrone Mackey, who was suspected of being a major drug dealer in the New Orleans area. This draft was in Knight's residence on January 30th, 2005, when Ronald Kimbrough, her estranged husband, arrived there to babysit their child.

In Knight's absence, Kimbrough found the draft affidavit, and read it. When he did so, Kimbrough realized that the Government was attempting to get a

wiretap on Mackey's phone. Kimbrough knew Mackey, but not well. However, one of Kimbrough's good friends, Terry Cordier, was also a good friend of Mackey's. Kimbrough called Cordier, who came to Knight's house. Kimbrough read the affidavit to Cordier (because Cordier has difficulty reading), but cautioned him not to tell anyone about it.

Not surprisingly, Cordier told Mackey about the affidavit the following day, and also told him the source of his information. Four days later, because of the presence of a Government informant in the Mackey organization, Kimbrough was arrested for obstruction of justice. Mackey and his associates continued to deal drugs until May, 2005, when all of them were indicted, and arrested. Kimbrough and Cordier were charged with conspiring with Mackey to obstruct justice, and with being accessories after the fact.

Twenty-three months later, in January 2007 (after delays caused by Hurricane Katrina), Kimbrough, acting without a plea agreement, entered a plea of guilty to conspiring to obstruct justice (18 U.S.C. §§ 1512(k) & 1512(c)). At the time Kimbrough pled guilty, he "absolutely disputed" any allegations that he had knowledge of the quantities of drugs being distributed by Mackey.

At Kimbrough's sentencing, the district court found that the sentencing guidelines limited Kimbrough's criminal liability to those acts of his co-conspirators that were foreseeable, and sentenced him to 30 months imprisonment. This ruling was

directly contrary to the Government's arguments that the guidelines for the offense at issue, as well as the guidelines for a number of related offenses, were not circumscribed by a foreseeability requirement. In the view of the Government, Kimbrough should have been sentenced as though he conspired to distribute all of the drugs distributed by the Mackey organization *after* Kimbrough told Cordier about the affidavit.[1]

The Government took an appeal from the sentence of the district court. On appeal, the Fifth Circuit agreed with the Government, and held that the "reasonable foreseeability" limitation imposed by U.S.S.G. § 1B1.3 did not apply to the offense of conviction, *i.e.*, obstruction of justice in a criminal case. The Fifth Circuit vacated Kimbrough's sentence, and remanded the matter for resentencing. That resentencing is now set for November 24, 2008. Hence, this petition.

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[1] On appeal, the Government argued that the offense level should be determined by the amount of cocaine that co-defendant Mackey had distributed *before* Kimbrough and Cordier learned of the wiretap.

REASONS FOR GRANTING THE PETITION

1. The Fifth Circuit has entered a decision that is in conflict with the decision of another United States court of appeals on the same important matter.

With its decision in *Kimbrough*, the Fifth Circuit has unmistakably joined the Fourth, Seventh, and Tenth Circuits in creating a large class of offenses to which the foreseeability limitation of U.S.S.G. § 1B1.3 does not apply. This class consists of all offenses covered by § 2X3.1 and § 2X4.1 of the sentencing guidelines, which include: (1) being an accessory after the fact to *any* offense; (2) misprision of *any* felony; and (3) obstruction of justice in *any* criminal case (the offense of conviction in this proceeding).

The Fourth, Fifth, and Tenth Circuits derive their interpretation of the guidelines for these offenses from the Seventh Circuit's strained reading of Application Note 10 of § 1B1.3 of the guidelines, a reading which was born in *United States v. Girardi*, 62 F.3d 943 (7th Cir.1995). In *Girardi*, the Seventh Circuit, without so much as even a passing reference to the plain language of U.S.S.G. § 1B1.3, concluded that the phrase "the conduct for which the defendant is accountable *includes* . . . " actually means "includes, *but is not limited to* . . . [reasonably foreseeable conduct]." *Girardi*, 62 F.3d at 946.

In short, the Seventh Circuit used an illogical interpretation of an Application Note to trump the plain language of one of the most basic of all guidelines,

and three other circuit courts of appeals have now followed suit.

Only the Sixth Circuit still adheres to the literal language of U.S.S.G. § 1B1.3 in these types of cases, by requiring that the relevant conduct of an offender, including base offense level, specific offense characteristics, cross-references, and adjustments, be based only on "all reasonably foreseeable acts and omissions of others. . . ."

As a consequence, because he is being sentenced in the Fifth Circuit, Kimbrough now faces a sentence (according to the Government's calculations) of between 78-97 months. Presumably, Kimbrough would also face a sentence of 78-97 months in the Fourth, Seventh, and Tenth Circuits.

Were he being sentenced in the Sixth Circuit, Kimbrough would face a sentence of 18-24 months, because courts in that circuit must limit a defendant's criminal liability for the acts of co-conspirators to conduct which is "reasonably foreseeable."

This "split" has not gone unnoticed by the circuit courts of appeal. In *United States v. Lang*, 364 F.3d 1210, 1220 (10th Cir.2004) the panel majority wrote: "Other circuits are split on how to resolve this apparent contradiction [between two sections of the guidelines]." In his dissent in that case, Judge Murphy discussed the "split" in the circuits at great length, and forcefully pointed out the problems with the approach taken by the *Lang* majority:

> Unfortunately, the approach adopted by the majority creates a system where accessories can be punished much more harshly than the principal whom they aided and, more importantly, renders U.S.S.G. § 1B1.3 superfluous.

United States v. Lang, 364 F.3d at 1229.

The same point was made by the Sixth Circuit in *United States v. Shabazz*, 263 F.3d 603 (6th Cir.2001). In *Shabazz,* the Court conducted an extensive and thoughtful analysis of the issue, and all relevant cases, and found that the very structure of the Guidelines required the imposition of a knowledge/ forseeability requirement to both the base offense level, and the specific offense characteristics:

> Reading the guidelines to impose a knowledge requirement before incorporating adjustments to the base offense level of an underlying offense into a defendant's base offense level renders any such adjustment appropriate upon a showing of a defendant's knowledge. This approach results in consistent treatment for adjustments for role in the offense, specific offense characteristics, and other sentencing factors and avoids creating one rule for a defendant's knowledge of specific offense characteristics and another for other underlying adjustments.

United States v. Shabazz, 263 F.3d at 609.

Even the Fifth Circuit noted the divergence of opinion among the various courts of appeal, in footnote 14 of its opinion.[2] Nevertheless, the Fifth Circuit, after discounting its own opinion in *United States v. Warters*, 885 F.2d 1226 (5th Cir.1989), followed the flawed logic of the Seventh Circuit in *Girardi*. Consequently, this Court should hear this matter, to resolve this important conflict.

2. The Fifth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court.

Based on previous filings from the United States in the courts below, it is relatively safe to assume that if asked, the United States will suggest to this Court that no "split" exists; or that if one does exist, it is over a minor matter not worthy of this Court's attention. This is simply not true. For what is at stake here is nothing less than the question of whether the "*Pinkerton* Doctrine" will continue to have meaning in the sentencing process.

Although this Court's decision in *Pinkerton v. United States*, 328 U.S. 640 (1946) originally engendered controversy, 60 years and thousands of

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[2] That footnote references most, but not all of the relevant decisions of the various courts of appeal: *United States v. Girardi*, 62 F.3d 943 (7th Cir.1995); *United States v. Cross*, 371 F.3d 176 (4th Cir.2004); *United States v. Lang*, 364 F.3d 1210 (10th Cir.2004), *reinstated by* 405 F.3d 1060 (10th Cir.2005); and *United States v. Shabazz*, 263 F.3d 603 (6th Cir.2001).

decisions have resolved most of the constitutional issues, and have given a very definite shape to the rule it created. A defendant may be held liable for the acts of co-conspirators if: (1) those acts are within the scope of the conspiracy; (2) those acts are in furtherance of the conspiracy; and (3) those acts are reasonably foreseeable as a necessary or natural consequence of the conspiracy. *Pinkerton,* 328 U.S. at 647-648.

These constitutionally grounded limitations are carried over into the Guidelines in § 1B1.3. In the absence of such limitations, courts would be inflicting punishment for conduct that a defendant did not commit, was not aware of, and did not foresee. This, of course, is precisely what has occurred in this case: the Fifth Circuit proposes to punish Kimbrough for conduct he did not commit, that he was not aware of, and that he did not foresee.

Worse, the Government would have the various courts of appeals remove the limitations of the *Pinkerton* Doctrine in a whole class of cases. While at first glance the offenses covered by the two sections at issue[3] appear to be minor in nature, a moment's reflection reveals the contrary. Virtually anyone who is a co-conspirator can also be charged as an accessory after the fact – something which becomes all the more

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[3] These are: (1) being an accessory after the fact to *any* offense; (2) misprision of *any* felony; and (3) obstruction of justice in *any* criminal case.

likely when foreseeability is no longer a limitation on the sentence that might be imposed.

And as this Court is aware, the crime of misprision of a felony has long been a favorite plea bargaining tool for both prosecutors and defense attorneys – because it is the only federal felony with a maximum sentence of less than five years. While very few defendants are ever prosecuted for the offense of misprision, many hundreds plead guilty to it every year. The appropriate sentence in each of these cases is now all but impossible to determine.

Before the guidelines, no federal court in the United States would have found it acceptable to sentence a defendant who was an accessory after the fact more severely than the principal. It is not just illogical, it stands four hundred years of common law on its head. There is nothing in Application Note 1 to U.S.S.G. § 1B1.3 that changes our understanding of legal history. This Court should grant review in this case.

CONCLUSION

Wherefore, this Court is respectfully urged to grant Ronald Kimbrough's petition for a writ of *certiorari.*

New Orleans, Louisiana, this 14th day of November, 2008.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-30452
c/w No. 07-30453

UNITED STATES OF AMERICA

Plaintiff-Appellant-Cross-Appellee

v.

RONALD KIMBROUGH

Defendant-Appellee-Cross-Appellant

UNITED STATES OF AMERICA

Plaintiff-Appellant

v.

TERRY CORDIER

Defendant-Appellee

Appeal from the United States District Court
for the Eastern District of Louisiana

(Filed July 21, 2008)

Before REAVLEY, BENAVIDES and OWEN, Circuit Judges.

REAVLEY, Circuit Judge:

Ronald Kimbrough and Terry Cordier were indicted for conspiracy to obstruct justice, obstruction of justice, and accessory after the fact because their conduct resulted in members of a cocaine trafficking organization being informed about an investigation by the Drug Enforcement Administration. Kimbrough pleaded guilty to the conspiracy charge, while Cordier pleaded guilty to all three charges. The Government appeals the district court's calculation of the defendants' offense levels under the sentencing guideline for obstruction of justice rather than for accessory after the fact. We conclude that the district court's sentencing determinations were erroneous and remand for resentencing.

I.

In October 2004, the DEA began an investigation of Tyrone Mackey and cocaine trafficking in New Orleans, Louisiana. One of the Assistant United States Attorneys working on the case was Kimbrough's estranged wife. In January 2005, Kimbrough was at his wife's home and came across a draft application for a Title III wiretap that targeted Mackey and members of Mackey's organization. The draft affidavit discussed Mackey's drug trafficking, and it included information about a specific drug transaction involving 500 grams of crack cocaine. Unbeknownst to his wife, Kimbrough read the application and recognized the names of several people listed

therein, including Mackey, who he knew to be a drug dealer. Kimbrough then contacted his life-long friend Cordier, who he also knew was friends with Mackey, and informed him about the investigation. Kimbrough read the document to Cordier and then replaced it to conceal from his wife the fact that he had discovered it.

The next day Cordier contacted Mackey and informed him that the Government was investigating Mackey's illegal drug activities and was tapping Mackey's phone. Mackey stopped using his telephone and instructed other members of the organization to also discontinue using their telephones. The disclosure of the investigation and the wiretap application hindered the investigation and prevented the DEA from discovering Mackey's drug supplier. After being informed about the investigation, Mackey was still able to distribute a quantity of cocaine in the New Orleans area.

After Kimbrough and Cordier pleaded guilty, their respective presentence reports (PSRs) calculated both defendants' base offense levels in a similar manner. The PSRs began with the obstruction of justice guideline found in U.S.S.G. § 2J1.2, which yielded a base offense level of 14. The PSRs applied a three-level enhancement under § 2J1.2(b)(2) because the offense resulted in substantial interference with the administration of justice. After a two-level reduction for acceptance of responsibility, both defendants had a total offense level of 15 and a guideline range of 18 to 24 months.

The Government objected and argued that the offense levels should be determined based on the guideline for accessory after the fact found in U.S.S.G. § 2X3.1. It argued that under that guideline the applicable offense level is based on the offense level for the underlying offense, which in this case is a drug conspiracy to distribute between 15 and 50 kilograms of cocaine. The Government initially argued that Kimbrough's and Cordier's offense level should be determined by the drug quantity that the Mackey organization was able to distribute after the defendants tipped Mackey about the investigation. It later argued, however, that the relevant drug quantity was the amount the organization had distributed up to the time that the defendants informed Mackey about the investigation and that the defendants need not have known or foreseen the drug quantity.

The district court denied the Government's objection to the PSRs. It concluded that § 2X3.1 was not applicable because, although Kimbrough and Cordier knew that Mackey was a drug dealer, the defendants lacked sufficient knowledge of the drug quantities involved. The district court therefore adopted the PSRs. It sentenced Cordier to 24 months in prison, and it departed upward from the guideline range to sentence Kimbrough to 30 months. The Government appeals from the district court's guideline calculations. Kimbrough has filed a cross-appeal challenging the district court's upward departure.

We hold that the district court erred by requiring the defendants to have specific knowledge of the drug

quantities involved in the underlying offense to determine their base offense levels under § 2X3.1.[1]

II.

The crux of this case is whether the defendants' base offense levels should have been determined with reference to the guideline for obstruction of justice under § 2J1.2 or the guideline for accessory after the fact under § 2X3.1. We review the district court's interpretation and application of the guidelines *de novo* and its findings of fact for clear error. *United States v. Griffith.*[2]

For obstruction of justice offenses, the starting point is § 2J1.2, which assigns a base offense level of 14 and calls for a three-level enhancement "[i]f the offense resulted in substantial interference with the administration of justice."[3] A cross-reference within the guideline directs that if the defendant "obstruct[ed] the investigation or prosecution of a criminal offense, apply § 2X3.1 (Accessory After the Fact) in respect to that criminal offense, if the resulting

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[1] Because we conclude that the district court erroneously calculated the defendants' guideline ranges, and we must remand for resentencing, we do not address Kimbrough's claim on cross-appeal that the court erroneously departed upward from the guidelines.

[2] 522 F.3d 607, 611 (5th Cir. 2008).

[3] U.S.S.G. § 2J1.2(b)(2) (2006). Unless otherwise noted, all references to the guidelines in this opinion are to the 2006 version that was applicable to Kimbrough and Cordier.

offense level is greater than that determined [under § 2J1.2]."[4]

Under § 2X3.1, the base offense level is "6 levels lower than the offense level for the underlying offense," except that the base offense level shall not be less than 4 nor more than 30.[5] For purposes of § 2X3.1, the "underlying offense" is generally "the offense as to which the defendant is convicted of being an accessory."[6]

Here, Cordier pleaded guilty to accessory after the fact, in violation of 18 U.S.C. § 3. Because the applicable guideline is determined first with reference to the offense of conviction, the starting point for calculating Cordier's offense level should have been § 2X3.1.[7] Cordier's offense level under § 2X3.1 will depend on the offense level for the underlying drug

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[4] § 2J1.2(c).

[5] *See* § 2X3.1(a)(1)-(3).

[6] § 2X3.1, comment. (n.1).

[7] *See* U.S.S.G. § 1B1.2(a) ("Determine the offense guideline section in Chapter Two (Offense Conduct) applicable to the offense of conviction (*i.e.*, the offense conduct charged in the count of the indictment or information of which the defendant was convicted)."). Although Cordier also pleaded guilty to conspiracy to obstruct justice and obstruction of justice, all counts are grouped into a single count under the grouping rules because all three counts were connected by a common criminal objective or constituted part of a common scheme or plan. *See* § 3D1.2(b).

conspiracy, which in turn depends on the drug quantity involved in the offense.[8]

The drug quantity is also important in Kimbrough's case. Kimbrough pleaded guilty to conspiracy to obstruct justice, in violation of 18 U.S.C. § 1512(k). Thus, his starting point was § 2J1.2, which resulted in a total offense level of 15. Kimbrough's conduct unquestionably obstructed the investigation of a criminal offense, however. Therefore, § 2J1.2's cross-reference to § 2X3.1 will be triggered if the offense level under § 2X3.1 is higher than 15.[9] As with Cordier, Kimbrough's offense level under § 2X3.1 depends on the drug quantity involved in the underlying offense.[10] The underlying drug conspiracy here involved drug quantities that undeniably result in an offense level much higher than that achieved under § 2J1.2.[11]

The district court refused to apply § 2X3.1 because it found that for the guideline to apply Kimbrough and Cordier must have known or should reasonably have known that their conduct would

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[8] *See* §§ 2D1.1(c), 2X3.1(a)(1).

[9] *See* § 2J1.2(c)(1).

[10] *See* §§ 2D1.1(c), 2X3.1(a)(1).

[11] For example, the draft wiretap affidavit indicated that the conspiracy involved at least 500 grams of crack cocaine. A drug offense involving at least 500 grams of crack cocaine has a base offense level of 36. *See* § 2D1.1(c). A reduction of six levels under the accessory guideline results in an offense level of 30. § 2X3.1(a)(1).

result in further distribution of drugs after they disclosed the investigation, and the court determined they did not have such knowledge. Application Note 1 to § 2X3.1 instructs the court to "[a]pply the base offense level plus any applicable specific offense characteristics that were known, or reasonably should have been known, by the defendant, *see* Application Note 10 of the Commentary to § 1B1.3 (Relevant Conduct)."[12] We have previously addressed this application note and determined that "[t]he limitation on 'reasonable foreseeability' applies *only* to the 'specific offense characteristic,' not the base offense level." *United States v. Cihak.*[13] For drug offenses, drug quantity is not a specific offense characteristic. Thus, under *Cihak,* Kimbrough and Cordier were not required to know or to reasonably foresee the drug quantities involved in the underlying drug offense, and the district court's contrary determination was erroneous.[14]

The defendants argue that this reading of § 2X3.1 conflicts with Application Note 1's reference to Application Note 10 of § 1B1.3, as well as with the plain language of § 1B1.3, and with our decision in

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[12] § 2X3.1, comment. (n.1).

[13] 137 F.3d 252, 264 (5th Cir. 1998) (emphasis added).

[14] *Id.; see also United States v. Girardi,* 62 F.3d 943, 946 (7th Cir. 1995); *United States v. Cross,* 371 F.3d 176, 180-81 (4th Cir. 2004); *United States v. Lang,* 364 F.3d 1210, 1220-21 (10th Cir. 2004), *reinstated by* 405 F.3d 1060 (10th Cir. 2005); *but see United States v. Shabazz,* 263 F.3d 603, 608-09 (6th Cir. 2001).

United States v. Warters.[15] Application Note 10 of § 1B1.3 provides that if the offense at issue is accessory after the fact, "the conduct for which the defendant is accountable includes all conduct relevant to determining the offense level for the underlying offense that was known, or reasonably should have been known, by the defendant."[16] The defendants contend that this language requires a knowledge element for all conduct that is attributable to them. We agree with the Seventh Circuit that "Application Note 10 does not say that an accessory after the fact's accountability is *limited* to conduct known or reasonably known; it merely states that the accessory's accountability *includes* conduct 'known' or that 'reasonably should have been known' by the accessory."[17] Furthermore, the plain language of § 1B1.3(a) instructs that the general relevant conduct rules apply "[u]nless otherwise specified." Section 2X3.1's Application Note 1 plainly provides that the knowledge requirement applies to the specific offense characteristics, not the factors that determine the base offense level.[18]

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[15] 885 F.2d 1266 (5th Cir. 1989).

[16] U.S.S.G. § 1B1.3, comment. (n.10).

[17] *Girardi*, 62 F.3d at 946.

[18] *Cihak*, 137 F.3d at 264. For example, the specific offense characteristics of an underlying drug offense that defendants must know or reasonably should have known include the possession of a dangerous weapon, the use of an aircraft to import or export a controlled substance, and the distribution of a controlled substance in a prison. *See* § 2D1.1(b)(1)-(3).

The defendants contend that requiring knowledge only of specific offense characteristics of the underlying offense, and not for conduct comprising the base offense level, may result in accessories being punished equally severely, if not more so, than the principals. The accessory guideline takes into account an accessory's lesser culpability by requiring that the base offense level be set six levels below the underlying offense, with a cap in most cases at 30.[19] The intent of the guidelines plainly is to begin with the principal's base offense level and then decrease accordingly for the accessory. Drug trafficking offenses are considered more severe in nature as the quantity of drugs involved increases, and the guidelines thus provide for increased punishment for principals when larger drug quantities are involved.[20] Determining the offense level under § 2X3.1 from the drug quantity in the underlying offense is reasonable to punish more severely "those who act as accessories-after-the-fact to more serious crimes."[21]

Our decision in *Warters* does not help the defendants. *Warters* construed the guidelines for misprision of a felony under § 2X4.1 where the underlying offense was a drug conspiracy that occurred in 1988.[22]

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[19] § 2X3.1(a).

[20] *See* § 2D1.1(c).

[21] *Cross*, 371 F.3d at 182 (internal quotation and citation omitted).

[22] *Warters*, 885 F.2d at 1270.

There, the district court made no finding as to the drug quantity involved in the underlying offense, and we remanded for resentencing, holding that the district court must determine the base offense level by determining the actual amount of drugs involved in the conspiracy and the amount that the defendant knew or should have known or foreseen as relevant conduct.[23] The guidelines and commentary for misprision of a felony under § 2X4.1 and for accessory after the fact under § 2X3.1 are similar. However, *Warters* was decided in September 1989 and construed a version of the Sentencing Guidelines that differs from the version at issue in the instant case. Specifically, the guidelines construed in *Warters* did *not* contain the instruction in the current guidelines to apply the base offense level of the underlying offense plus specific offense characteristics that the defendant knew or should have known.[24] Therefore, the *Warters* court was not faced with construing the limitation on foreseeability found in Application Note 1 to both § 2X3.1 and § 2X4.1. We addressed that in *Cihak,* and we find that *Cihak* is the relevant precedent here.

Furthermore, even if Kimbrough and Cordier were required to foresee a drug quantity involved in the underlying drug offense, there was some evidence of such knowledge. Kimbrough and Cordier both knew about Mackey's illegal drug activity, and the

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[23] *Id.* at 1272-73.

[24] *See* U.S.S.G. §§ 2X3.1, 2X4.1 (1988).

wiretap affidavit that Kimbrough read included the information that at least 500 grams of crack cocaine had been sold by the Mackey organization. Kimbrough and Cordier therefore knew, or reasonably should have known, that the underlying offense involved substantial amounts of drugs.

We therefore hold that the district court erroneously calculated the defendants' base offense levels by requiring that they know or reasonably foresee the drug quantities involved in the underlying drug conspiracy. Because the district court is required to consider the correctly calculated guideline range when imposing a sentence, Kimbrough and Cordier must be resentenced.[25] On remand, the district court should begin with the correct guideline range and is free to consider all the facts and circumstances of the case, along with the factors in 18 U.S.C. § 3553(a), that it deems relevant to its individualized assessment of the proper sentence to be imposed.[26]

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[25] *See Gall v. United States*, 128 S. Ct. 586, 596 (2007); *United States v. Mares*, 402 F.3d 511, 519 (5th Cir. 2005) ("This duty to 'consider' the Guidelines will ordinarily require the sentencing judge to determine the applicable Guidelines range even though the judge is not required to sentence within that range.").

[26] *See Gall*, 128 S. Ct. at 596-97.

III.

The district court's judgments are VACATED, and the cause is REMANDED for resentencing of both defendants.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS, LOUISIANA

UNITED STATES OF AMERICA	CRIMINAL ACTION NO. 05-168
VERSUS	
TYRONE MACKEY, GERARD DORSEY, JEROME LEONARD, RONALD KIMBROUGH, AND TERRY CORDIER	

SENTENCING HEARING BEFORE THE
HONORABLE IVAN L.R. LEMELLE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

UNITED STATES OF AMERICA	ROBERT SPELKE MATTHEW R. STIGLITZ U.S. DEPARTMENT OF JUSTICE NARCOTICS AND DANGEROUS DRUG SECTION 1400 New York Ave., NW WASHINGTON, DC 20005
[2] For the Defendant, Tyrone Mackey	Laurie White & Associates, LLC BY: Laurie Anne White 633 Carondelet Street New Orleans, Louisiana 70130

Official Court Reporter Pinkey Ferdinand, CCR
500 Poydras Street,
Room HB-406
New Orleans, Louisiana
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Proceedings recorded by mechanical stenography, transcript produced by computer.

[3] PROCEEDINGS

(April 18, 2007)

* * *

[25] responsible for to show that this Accessory After the Fact was not a principle, was not involved in the crime. And, clearly, Your Honor, I think the court alluded to before, to be Accessory After the Fact you don't have to distribute drugs. There is no requirement. And the facts are, the Government will submit to the court that neither Mr. Cordier nor Mr. Kimbrough – we have no evidence that they submitted drugs. None. We'll admit to that, but that does not stop them from being Accessory After the Fact.

THE COURT: No one disputes that what Kimbrough and Cordier did in informing the drug organization that they were under federal investigation, and specifically there was even this application for a wire tap, that either aided the drug dealers from being detected or led to them as it did there, destroying whatever telecommunication devices that might

have been the subject of the application. I believe there were some cell phones destroyed afterward –

MR. SPELKE: That is correct, Your Honor. The evidence –

THE COURT: But the real question here is, to what extent one can be accountable to guideline calculation for this conduct? And I know that the Cihak – or however you want to pronounce it – 5th Circuit opinion goes into an explanation, at least to that panel of the 5th Circuit, knowledge or reasonable forseeability is not the issue, the [26] issue is, you know, base offense level calculations.

Again, to me it is clearly a decision that's in conflict with that much earlier 5th Circuit opinion relied on by probation, the waters case. And it leaves then a conflict, not only in the Circuits that both sides have been cited to me, as well as within the memoranda before me, but to what extent this later opinion by the 5th Circuit to be given some greater weight than the earlier opinion. And while I realize one may have been on a summary calendar and one not, that should not be the outcome determining factor how it's decided; how it came down procedurally from the 5th Circuit. And I think what's important is the rational [sic] in each. And it's subscribing and giving now I believe, since neither one is an en banc decision in the 5th Circuit. And certainly Cihak does not explicitly overrule waters.

I believe this court has some discretion in adopting the rational [sic] of one over the other, or perhaps

looking to other opinions that might have been used to help explain the position of the 5th Circuit.

However, where there is doubt in that regard as to what the 5th Circuit's position is, it would seem to me that one should not resolved that doubt automatically in favor of the view point that would increase someone's guideline base offense levels. I frankly have some trouble in what I call an over-technical sentencing system. In most instances I think I [27] have applied guideline sentences in all instances as we do now. We certainly have to consider them, but they're not binding on the court, they're discretionary.

I think that when you talk about sentencing, one should really consider a Defendant's conduct. That's one of the first factors we look at, not the outcome determinative factor, but a first factor. And to what extent the defendants could be held accountable, either for guideline calculations, and also later for sentencing, it's important still for me, from my philosophy of sentencing to determine whether they had some general, specific, or even reasonable forseeability of what their actions could in event result in.

To the extent that the Court here is going to overrule the Government's objection and follow the rational and ultimate conclusion recommended to me by Probation, I do so recognizing again this conflict in the Circuit, but also recognizing that for sentencing principles, waters seem to be the better viewpoint in the sense that it takes into account the Defendant's conduct. Did the defendant know or have reason to

know that their conduct would have led to, distributed to the further distribution of drugs? And that viewpoint to me is one that waters would go against in this particular situation.

For those reasons, I'm going to overrule the Government's objection and adopt the recommendation by [28] probation in that regard. There was objections in each instance. As to Kimbrough and Cordier, I've noted for the record for possible resolution of Circuit down the line. It will be interesting to see how our Circuit views this particular within the Circuit.

Anything else regarding objections?

MR. SPELKE: Your Honor, I just want to note for the record, just so that the record is clear, because I think the Government will at least contemplate an appeal.

Is the Court now saying that Accessory After the Fact guideline does not apply?

THE COURT: The Court is adopting the view of Waters for the reasons that I stated.

MR. SPELKE: Again, Your Honor, it's not clear to me whether or not the court is saying that 2(J)(1) and 2(C) doesn't apply. According to probation, Your Honor, it may apply, but probation doesn't believe it's appropriate now. If that's the Court's position, then, fine, I'll keep that as what's on the record.

THE COURT: All right. All right, anything else? Either side?

MR. FORET: No, sir.

THE COURT: All right. Lets go to defendants. As I said they have no objections. And to repeat what I said to Mr. Craft, if someone has some weakness in the knees, or

* * *

UNITED STATES DISTRICT COURT

EASTERN District of LOUISIANA

UNITED STATES OF AMERICA

V.

RONALD KIMBROUGH

JUDGMENT IN A CRIMINAL CASE

Case Number: 05-168 "B"

USM Number: 29481-034

DONALD L. FORET
Defendant's Attorney

THE DEFENDANT:

X pleaded guilty to count 11 of the Superceding Indictment on January 11, 2007

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Count
18 USC § 1512(k) 18 USC § 1512(c)(2) 18 USC § 2	VIOLATIONS OF THE FEDERAL CONTROLLED SUBSTANCES ACT	11

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

On motion of the United States, IT IS ORDERED that the Original Indictment and Counts 12 and 13 of the Superceding Indictment are hereby DISMISSED as to this defendant.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

COURT REPORTER:	**PINKEY FERDINAND**
U.S. ATTORNEYS:	**MATTHEW STIGLITZ and ROBERT SPELKE**
PROBATION OFFICER:	**DAVID ARENA**
DEPUTY CLERK:	**AUDRY E. STEWARD**

CERTIFIED AS A TRUE COPY ON THIS DATE _____

BY: _____
Deputy Clerk

APRIL 18, 2007
Date of Imposition of Judgment

/s/ Ivan L.R. Lemelle
Signature of Judge

IVAN L.R. LEMELLE,
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

APRIL 20, 2007
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 30 months as to Count 11. IT IS FURTHER ORDERED that the defendant shall pay to the United States a fine of $3,000.00 as to Count 11. Said fine includes the cost of confinement.

X The court makes the following recommendations to the Bureau of Prisons:

That the defendant be placed in a facility that can best accommodate visitation by family members.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ noon ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

X The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

X before 12:00 noon on June 4, 2007.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ a _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

BY: _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of three years as to Count 11.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

X The defendant shall cooperate in the collection of DNA, as directed by the Probation Officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the Probation Officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony,

unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL STANDARD CONDITIONS OF SUPERVISION

In addition, the following special conditions are imposed:

(1) The defendant shall participate in an orientation and life skills program as directed by the Probation Officer.

(2) The defendant shall participate in a program of testing and/or treatment for drug abuse,

as directed by the Probation Officer, until such time as the defendant is released from the program by the Probation Officer. The defendant shall contribute to the cost of such treatment to the extent that the defendant is deemed capable by the Probation Officer.

(3) The defendant shall participate in a program of testing and/or treatment for alcohol abuse, as directed by the Probation Officer, until such time as the defendant is released from the program by the Probation Officer. The defendant shall contribute to the cost of such treatment to the extent that the defendant is deemed capable by the Probation Officer.

(4) Within the first year of release from imprisonment, defendant shall perform 50 hours of community service, as directed by the U.S. Probation Officer. The skills that defendant possesses would best be used while performing community service.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	**$ 100.00**	**$ 3,000.00**	**$ 0**

THE SPECIAL ASSESSMENT OF $100.00 AS TO COUNT 11 IS ORDERED DUE IMMEDIATELY.

☐ The determination of restitution is deferred until ___. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 USC § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	**Total Loss***	**Restitution Ordered**	**Priority or Percentage**
TOTALS	$ _____	$ _____	

☐ Restitution amount ordered pursuant to plea agreement. $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 USC § 3612(f). All of the payment options

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* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 USC § 3612(g).

X The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

X the interest requirement is waived for the X fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, ☐ E, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F X Special instructions regarding the payment of criminal monetary penalties:

THE SPECIAL ASSESSMENT IS ORDERED DUE IMMEDIATELY.

THE PAYMENT OF THE FINE OF $3,000.00 SHALL BEGIN WHILE THE DEFENDANT IS INCARCERATED, UPON RELEASE, ANY UNPAID BALANCE SHALL BE PAID AT A RATE OF $100.00 PER MONTH. THE PAYMENT IS SUBJECT TO INCREASE OR DECREASE, DEPENDING ON THE DEFENDANT'S ABILITY TO PAY.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of

Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several
Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-30452

UNITED STATES OF AMERICA

Plaintiff-Appellant-Cross-Appellee

v.

RONALD KIMBROUGH

Defendant-Appellee-Cross-Appellant

Consolidated with: 07-30453

UNITED STATES OF AMERICA

Plaintiff-Appellant

v.

TERRY CORDIER

Defendant-Appellee

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

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ON PETITION FOR REHEARING EN BANC

(Filed Aug. 19, 2008)

(Opinion 07/21/08, 5 Cir., ___, ___ F.3d ___)

Before REAVLEY, BENAVIDES, and OWEN, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge